

IT 02-6

Tax Type: Income Tax  
Issue: Motion to Dismiss  
Jurisdiction  
Case or Controversy

**STATE OF ILLINOIS  
DEPARTMENT OF REVENUE  
OFFICE OF ADMINISTRATIVE HEARINGS  
CHICAGO, ILLINOIS**

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ABC, INC.,	)	Docket No.	01-IT-0000
	)	FEIN:	00-0000000
	)	Tax Years	12/91 - 12/93
v.	)	John E. White,	
THE DEPARTMENT OF REVENUE	)	Administrative Law Judge	
OF THE STATE OF ILLINOIS	)		

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**RECOMMENDED ORDER  
REGARDING THE DEPARTMENT'S MOTION TO DISMISS**

**Appearances:** Theodore Bots, McDermott, Will & Emery appeared on behalf of ABC, Inc.; David Dorner, Special Assistant Attorney General, appeared on behalf of the Illinois Department of Revenue.

**Synopsis:** On February 15, 2002, the Illinois Department of Revenue ("Department") presented its Motion to Dismiss ("Department's Motion") for hearing. After considering the Department's Motion, and the arguments presented prior to and at hearing, I am including in this recommended order statements of uncontested fact and conclusions of law. I recommend that the Director grant the Department's Motion, but that it be granted without prejudice to ABC's right to contest any subsequent Department action taken should ABC seek to actually use the amounts reported on its 1991 through 1993 amended Illinois tax returns as a deduction on a return filed for a later year.

**Facts Not In Dispute:**

1. ABC, Inc. (“ABC” or “taxpayer”) filed amended Illinois income tax returns for each of the tax years ending December 31, 1991 through 1993. Department’s Motion, ¶ 13; Taxpayer’s Response to Department’s Motion to Dismiss (“Taxpayer’s Response”), p. 1.
2. Within those amended returns, ABC did not ask for a refund of taxes previously paid to the Department. Department’s Motion, ¶¶ 9-11; Taxpayer’s Protest, p. 2. Rather, each return purported to correct the amount of the subtraction modification taxpayer previously reported on each of its Illinois returns, by increasing each such amount. Department’s Motion, ¶ 10; Taxpayer’s Protest, p. 2.
3. Each changed subtraction modification, in turn, either increased the amount of taxpayer’s net operating loss originally reported on its Illinois return, or reduced the amount of Illinois income taxpayer reported for a tax year, thereby reducing the amount of the net operating loss deduction that taxpayer used for that year. Department’s Motion, ¶ 10; Taxpayer’s Protest, p. 2.
4. If taxpayer’s amended returns are correct, it has more net losses available to be used as deductions regarding future tax years. Department’s Motion, ¶¶ 13-14; Taxpayer’s Protest, p. 2. ABC has not, however, sought to use any of its putative increase in the amount of its available net losses as a deduction on a return filed with the Department. Department’s Motion, ¶¶ 9-10, 13-14; Taxpayer’s Protest, p. 2.
5. On June 30, 2000, the Department issued a Notice of Denial (“Denial”) with regard to taxpayer’s amended returns, on which it stated, in part, “We cannot process your claim for refund of overpayment of income tax because you filed too late.” Taxpayer’s Response, Exhibit A (copy of the Department’s Denial); Department’s Motion, ¶ 9.
6. The Department’s Motion concedes that the basis articulated within its Denial was mistaken. Department’s Motion, ¶ 9.
7. The Department’s Motion concedes that its Denial was issued erroneously because, *inter alia*, ABC has not sought to apply any putative increase in the amount of its net losses claimed to be available to be carried forward, as a deduction against future net income on a return filed with the Department. *See* Department’s Motion, ¶¶ 9, 13-14.

### **Conclusions of Law:**

The Department's Motion is predicated upon § 2-619(a)(1) of Illinois' Code of Civil Procedure. 735 ILCS 5/2-619(a)(1). Section 2-619 provides, in pertinent part:

Involuntary dismissal based upon certain defects or defenses.

(a) Defendant may, within the time for pleading, file a motion for dismissal of the action or for other appropriate relief upon any of the following grounds. If the grounds do not appear on the face of the pleading attacked the motion shall be supported by affidavit:

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(1) That the court does not have jurisdiction of the subject matter of the action, provided the defect cannot be removed by a transfer of the case to a court having jurisdiction.

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(9) That the claim asserted against defendant is barred by other affirmative matter avoiding the legal effect of or defeating the claim.

735 ILCS 5/2-619 (1996). I have quoted § 2-619(a)(9) because I believe that it, and not subparagraph (a)(1), provides the more appropriate statutory support for dismissal in this case.

Generally, section 2-619 affords a means of obtaining a summary disposition of issues of law or of easily proved issues of fact. Johnson v. Du Page Airport Authority, 268 Ill. App. 3d 409, 414, 644 N.E.2d 802, 806 (2d Dist. 1994). Under section 2-619(a)(1), a cause of action can be dismissed when a court finds it lacks subject matter jurisdiction. Young v. Caterpillar, Inc., 258 Ill. App. 3d 792, 793, 629 N.E.2d 830, 831 (3<sup>rd</sup> Dist. 1994). A section 2-619(a)(9) motion is properly allowed only when it raises an affirmative matter which negates plaintiff's cause of action completely or when it refutes crucial conclusions of law or conclusions of material fact that are unsupported by allegations of specific facts. American Health Care Providers, Inc. v. County of Cook, 265 Ill.App.3d 919, 922, 638 N.E.2d 772, 775 (1<sup>st</sup> Dist. 1994).

In assessing a section 2-619 motion to dismiss, all facts properly pleaded or which are clear from the face of the pleadings, and which relate to the claim, must be taken as true. Barber Coleman Co. v. A & K Midwest Insulation Co., 236 Ill. App. 3d 1065, 1072-74, 603 N.E.2d 1215, 1221-23 (5<sup>th</sup> Dist. 1992) (comparing §§ 2-615, 2-619 and 2-1005, and pointing out that, for purposes of 2-619, only those facts related to the claim

should be taken as true). Here, the facts of what occurred are clear, and are not in dispute. ABC filed amended returns in which it purports to correct — by increasing — the amount of its net operating losses during certain tax years, or in which it purports to correct — by decreasing — the amount of a net loss that ABC used as a deduction during a given year. What ABC's amended returns do not do, however, is to actually carry forward and use any of the putatively increased amounts of net losses ABC claims are available to it as a deduction against net income ABC reported on a return filed with the Department. The Department issued a Denial to ABC regarding its amended returns, which Denial notified ABC of its appeal rights. Thereafter, ABC filed a timely protest to the Department's Denial, and asked for a hearing regarding that protest.

The Department's Motion directly calls into question whether the Department has the statutory authority to hold a hearing under the facts present here, and whether taxpayer has a right to such a hearing. It asserts that ABC's protest must be dismissed because the Illinois General Assembly intended to limit both a taxpayer's right to a hearing (Department's Motion, ¶ 3), and the Department's authority or jurisdiction to hold a hearing requested by a taxpayer (Department's Motion, ¶¶ 6, 15), to only those income tax matters for which the Department issued a notice of deficiency to a taxpayer under IITA § 908, or where a taxpayer filed an amended return seeking a claim for refund under IITA § 910.<sup>1</sup> The motion also asserts that the Department erred by issuing its Denial since ABC has never sought to use any putative increase in the amount of its available net losses as a deduction. Since ABC has not sought to actually use any of the putative increases — and since that occasion may, in fact, never present itself — the Department argues that there is no dispute between the parties that is ripe for or capable of administrative resolution. In its reply, the Department also proposed that its motion be considered in the nature of a motion for voluntary dismissal of its Denial, which should be granted without

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<sup>1</sup> Because this matter does not involve a Notice of Deficiency, I will limit my discussion to the claim and credit provisions of the IITA, as well as to related statutory and regulatory provisions.

prejudice to the rights or powers of either party, in the event ABC actually attempts to use the putative increased amount of available net losses as a deduction on a future year's tax return.

At oral argument, and after having the opportunity to review the Department's Motion and its Reply, taxpayer argued that, if the Department's Motion is premised on its concession that it exceeded its statutory authority by issuing the Denial in this case, then the Department should say so openly, so that ABC can demand and seek reimbursement of its attorney fees spent to protest the matter so far, pursuant to Illinois' Administrative Procedures Act. *See* 5 ILCS 100/10-55. The Department refused to address ABC's argument and demand at oral argument, other than to assert that attorney fees cannot be recovered through an administrative hearing.

I am not convinced that §§ 909(e) and 910(a) must be read to reflect the Illinois General Assembly's intent to prohibit the Department from having any powers to deny or otherwise respond or act upon any amended returns but those filed to claim a refund, as the Department suggests. *Compare* Department's Motion, ¶¶ 3-6, 18 *and* Department's Reply, ¶¶ 9-10, 12, 17 *with* 35 ILCS 5/914 ("For the purpose of administering and enforcing the provisions of this Act, the Department ... may hold investigations and hearings concerning any matters covered by this Act \*\*\*") *and* Parliament Insurance Co. v. Department of Revenue, 50 Ill. App. 3d 341, 346-47, 365 N.E.2d 667, 671 (1<sup>st</sup> Dist. 1977) (the word "may" ordinarily connotes discretion). Therefore, I am not basing my recommendation to grant the Department's Motion on the Department's claimed lack of subject matter jurisdiction to either issue the Denial or to hold a hearing regarding it. Business and Professional People for the Public Interest v. ICC, 136 Ill. 2d 192, 244-45, 555 N.E.2d 693, 717 (1989) (distinguishing between agency action that is erroneous and action that lacks statutory authority). Rather, I conclude that, since there is no dispute that ABC has not sought to use any of the putative increase in the amount of its net losses available to be used as a deduction against a future year's net income, that fact presents a sound basis for dismissing the current action under § 2-619(a)(9). ABC achieves nothing tangible from having the correct amount of its

available net losses ascertained at this time, since it has never sought to receive any tax benefit authorized by the IITA from such losses.

On this point, and at oral argument, counsel for ABC agreed with the Department that, had the Department not issued its Denial, ABC would not have deemed its amended returns to have been denied until it actually sought to report and use any of its putative increased loss as a deduction against net income, and the Department took some contrary action against it. Deferring administrative contests regarding the amount of net losses available to be carried forward by a taxpayer until such time as the taxpayer actually uses such a loss as a deduction against net income, moreover, appears to be the tax court's practice under § 172 of the Internal Revenue Code, even though it may have jurisdiction over the matter. See Jones v. Commissioner, 79 T.C. 668, 673, Tax Ct. Rep. ¶ 39,443 (October 25, 1982) ("We conclude that our opinions in *McGowan* and *LTV Corp.* establish that, at the very least, there is an element of discretion in deciding whether to avoid rendering a decision on the merits even where it is firmly established that the ultimate result will be no deficiency for the years before the Court."); LTV Corp. v. Commissioner, 64 T.C. 589, 594-96 (1975) (even though it had jurisdiction, the tax court declined to consider the amount of net losses available to be carried forward to years for which no net loss deductions had been used).

## **Conclusion**

The Department concedes that its Denial was procedurally erroneous. While the Department's issuance of the Denial may have been erroneous, I do not conclude that it was an act that was beyond the Department's statutory authority. See Business and Professional People, 136 Ill. 2d at 244-45, 555 N.E.2d at 717. Further, I make no conclusions regarding the correctness or incorrectness of the changes made on ABC's amended returns for the tax years ending in 1991 through 1993, because any such conclusions are currently premature, and will be necessary only if: (1) ABC files a return on which it uses any of the putative 1991 to 1993 loss increases as a

deduction against net income; and (2) the Department, thereafter, acts to contest ABC's deduction of such losses.

**WHEREFORE IT IS HEREBY ORDERED THAT:**

- The Department's Motion is granted, without prejudice to ABC's ability to contest any subsequent Department action regarding the losses or net loss deductions reported on its amended returns, if and when ABC actually uses such losses as a deduction against a future year's net income.
- This matter is closed.

3-11-02  
Date

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Administrative Law Judge